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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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MAR 31 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the matter of

Amendment of Parts 1, 2, and 21 of the

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) PR Docket No. 92-80

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EXECUTIVE SUMMARY

The Commission should clarify that, Paragraph 14 of the *Report and Order* notwithstanding, MDS applicants, conditional licensees and licensees may enter into contingent license transfer/assignment agreements, so long as no person holds contingent interests in more than one mutually-exclusive applicant.

On reconsideration, the Commission should adopt processing procedures implementing “one stop shopping” and affording the highest processing priority to those applications most likely to benefit a wireless cable operator.

Now that the Commission has eliminated the incentive for application mills to file hundreds of mutually-exclusive applications simultaneously, it should revise its rules regarding service of interference analyses on ITFS interests and petitions to deny to avoid unnecessary delays in processing MDS applications.

The Commission should clarify that an MDS applicant must own, have an option to purchase, have a lease or have an option to lease its proposed transmission site prior to making the certification required by amended Section 21.15(a).

The Commission should reconsider and clarify the rules associated with the installation of signal booster stations pursuant to Section 21.913(g) so that low power devices can be installed with the minimum regulatory burden.

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Amendment of Parts 1, 2, and 21 of the) PR Docket No. 92-80
Commission's Rules Governing Use of the) RM 7909
Frequencies in the 2.1 and 2.5 GHz Bands)

**PETITION FOR CLARIFICATION AND
LIMITED RECONSIDERATION**

The Wireless Cable Association International, Inc. ("WCA"), by its attorneys and pursuant to Section 1.106(a)(1) of the Commission's Rules, hereby petitions for clarification and limited reconsideration of the *Report and Order* in the captioned proceeding.

I. STATEMENT OF INTEREST AND INTRODUCTION.

As the trade association of the wireless cable industry, WCA has a vital interest in the subject of this proceeding -- the future of the rules and policies that govern the licensing of the Multipoint Distribution Service ("MDS")^{1/} facilities that wireless cable system operators depend upon to distribute programming to their subscribers.^{2/} It was WCA's December 16, 1991 Petition for Rulemaking that led

^{1/} For purposes of this pleading, WCA will employ the convention adopted in the *Report and Order* of using "MDS" to refer collectively to the single channel and multichannel MDS authorizations, unless otherwise indicated. *See Amendment of Parts 1, 2 and 21 of the Commission's Rules Governing Use of the Frequencies in the 2.1 GHz and 2.5 GHz Bands*, FCC 93-31, at 1 n.1 (rel. Feb. 12, 1992)[hereinafter cited as "*Report and Order*"].

^{2/} *See, e.g. Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private*
(continued...)

to many of the proposals advanced in the *Notice of Proposed Rule Making* (the “*NPRM*”), and WCA has been an active participant in the proceedings in this docket to date.^{3/}

WCA generally applauds the *Report and Order* as a valuable step towards eliminating the application mills and inappropriate regulations that have slowed MDS application processing to a crawl. The Commission has wisely chosen to reject the more radical, overbroad proposals put forward in the *NPRM* in favor of an approach that more narrowly targets the source of the problem -- speculative applications and obsolete rules and policies.^{4/} WCA is certainly pleased that the Commission has adopted every one of the proposals WCA advanced in its Petition for Rulemaking.

^{2/} (...continued)
Operational-Fixed Microwave Service, Multichannel Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service, 5 FCC Rcd 6410 (1990)[hereinafter cited as “*Gen. Docket No. 90-54 R&O*”].

^{3/} See Comments of Wireless Cable Ass’n Int’l, PR Docket No. 92-80 (filed June 29, 1992)[hereinafter cited as “WCA Comments”]; Reply Comments of Wireless Cable Ass’n Int’l, PR Docket No. 92-80 (filed July 14, 1992).

^{4/} For example, WCA supports the Commission’s rejection of proposals advanced in the *NPRM* to impose station-to-station mileage separation standards, limitations on tower height, and far greater protection to ITFS receive sites from MDS operations than currently is required. See *Amendment of Parts 1, 2 and 21 of the Commission's Rules Governing Use of the Frequencies in the 2.1 GHz and 2.5 GHz Bands*, 7 FCC Rcd 3266 (1992)[hereinafter cited as “*NPRM*”].

Quite candidly, WCA is bitterly disappointed by the Commission's failure to address the gross deficiencies in the Section 21.902(d) definition of the MDS protected service area ("PSA").^{5/} As WCA noted in its comments in this proceeding, "the current PSA definition is a ticking time-bomb set to explode" once the Commission lifts the current freeze on new MDS applications.^{6/} Unless the PSA definition is adjusted to provide wireless cable operators with appropriate levels of protection, the lifting of the MDS filing freeze will be marked by an influx of speculative and greenmail applications. All the Commission need do is look at the flood of insincere Instructional Television Fixed Service ("ITFS") applications it received over the past year to realize the opportunities for mischief an inadequate PSA presents. However, in light of the Commission's commitment to address the inadequacy of the PSA definition in response to WCA's pending petition for reconsideration in General Docket No. 90-54, WCA will refrain from seeking reconsideration here.

Rather, WCA will focus this petition on several issues that either require clarification, or were raised in the comments but not addressed in the *Report and Order*.

^{5/} *Report and Order*, *supra* note 1, at 10 n. 40.

^{6/} WCA Comments, *supra* note 3

II. DISCUSSION

A. The Commission Should Clarify That MDS Applicants, Conditional Licensees and Licensees May Enter Into Contingent License Transfer/Assignment Agreements, So Long As No Person Holds Contingent Interests In More Than One Mutually-Exclusive Applicant.

Adopting a proposal first advanced in the NPRM, the Commission has amended Sections 21.29 and 21.39 of the Rules to further restrict the circumstances under which interests in MDS applications and conditional licenses may be transferred or assigned prior to the completion of construction.^{7/} Although WCA initially opposed those proposed amendments as eliminating important safety valves that are employed by wireless cable operators to engage in legitimate business activities,^{8/} it is heartened by the Commission's acknowledgement that waivers of the new rules will be available.^{9/} Thus, WCA does not seek reconsideration of the decision to amend Sections 21.29 and 21.39.

However, WCA urges the Commission to clarify the meaning behind the sentence in Paragraph 14 of the *Report and Order* explaining that "[t]he adoption of these rule changes will supplement the ban on the formation of settlement agreements by prohibiting common settlement transactions that include options to

^{7/} See *NPRM*, *supra* note 4, at ¶¶ 14-15.

^{8/} See *WCA Comments*, *supra* note 3, at 43-46.

^{9/} *Report and Order*, *supra* note 1, at ¶ 15.

buy.”^{10/} Specifically, WCA believes that the Commission should eliminate uncertainty that this sentence has caused by reaffirming that applicants, tentative selectees, conditional licensees and licensees may continue to enter into contingent transfer and assignment agreements (such as options to buy), so long as no one person acquires contingent interests in multiple mutually-exclusive applications.

From informal discussions with the Commission’s staff, WCA understands that the purpose of the sentence in question was to ban what apparently had become commonplace -- the principals of an application mill would secure options to purchase authorizations from each of the mill’s customers. Certainly, WCA applauds that goal, which advances the public interest in deterring speculative applications. WCA believes that the goal has been accomplished by the amendment of the Rules to provide that no person having an interest in one MDS application for a market may have any interest in another mutually-exclusive application. To emphasize that point, the Commission should consider amending new Section 21.915 to make clear that the phrase “any interest” in Section 21.915 of the Rules includes contingent interests.

By the same token, the Commission should make clear that the sentence in issue in Paragraph 14 does not prevent the granting of contingent interests in other contexts, provided that Commission consent is required prior to the

^{10/} *Id.* at ¶ 14.

consummation of any license transfer or assignment. The Commission has previously recognized that contingent transfer and assignment agreements serve a valuable role in the structure of the wireless cable industry and should not be discouraged.^{11/} That remains true today. The granting of contingent interests is a standard element of many of the financing packages being developed. Moreover, most wireless cable operators secure an option to purchase whenever they enter into an agreement to lease transmission capacity on an MDS station. That should come as no surprise to the Commission, which has held that “wireless cable systems need to control as many channels as possible in order to compete with cable systems, and leasing channels from multiple licensees is unnecessarily burdensome and time-consuming for both wireless cable operators and the Commission.”^{12/} By using options to purchase, wireless cable operators can assure themselves of the security that comes with owning the transmission facilities they depend on, while preserving scarce capital during the early years of operations.

The sentence in issue is already creating uncertainty in the wireless arena, as it has called into question legitimate, traditional vehicles for doing

^{11/} *Amendment of Part 21 of the Commission's Rules*, 4 FCC Rcd 2287, 2288 (rel. March 10, 1989).

^{12/} *Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service*, 5 FCC Rcd 6410, 6411-12 (1990), *on recon.* 6 FCC Rcd 6764 (1991).

business. The Commission should move rapidly to eliminate this uncertainty by making clear that MDS applicants, conditional licensees and licensees may enter into contingent agreements to transfer or assign authorizations, so long as no person holds contingent interests in more than one mutually-exclusive application.

B. The Commission Should Afford The Highest Processing Priority To Those Applications Most Likely To Benefit A Wireless Cable Operator.

Historically, one of the greatest challenges facing prospective wireless cable operators has been the daunting task of maneuvering applications for up to thirty-three MDS and ITFS channels through Commission processing. In this proceeding and elsewhere, WCA has been advocating that the Commission adopt a system under which the highest processing priority would be afforded to those applications most likely to benefit legitimate wireless cable operators.^{13/} Unfortunately, the Commission has not addressed WCA's proposal in the *Report and Order*, an omission WCA urges the Commission to rectify on reconsideration.

The problem the wireless industry faces has been two-fold. First, the staff resources devoted to processing MDS and ITFS applications have not kept pace with the number of applications being filed. The marketplace success of those wireless cable systems that are operating, coupled with the improved regulatory environment created as a result of General Docket No. 90-54, has spurred an

^{13/} See, e.g. Letter to Chairman Alfred C. Sikes from Paul J. Sinderbrand, Counsel to WCA (dated Jan. 21, 1992); WCA Comments, *supra* note 3, at 64-68.

unprecedented number of applications for wireless cable facilities. In addition, the Common Carrier and Mass Media Bureaus are both seeing a dramatic increase in the number of applications that appear to be either speculative or strike applications. As a result, those who are truly interested in developing wireless cable systems just cannot secure timely processing of their applications. Compounding the problem, the two Bureaus historically have not coordinated in developing processing priorities, so prospective wireless operators often find themselves with some, but not all, of the licenses they need to launch their systems.

WCA believes that the two most productive steps the Commission can take at this time are (1) to give the highest application processing priority to the issuance of licenses that will be employed by legitimate wireless cable operators, and (2) to coordinate the processing of ITFS and MDS applications so that all of the pending applications for a given market are processed simultaneously. In its comments in this proceeding, WCA set forth the following suggestion as to how the Commission can accomplish this goal.

WCA believes the focal point of the Commission's effort should be a "Wireless Cable Processing Committee" consisting of the chiefs of the Domestic Radio and Distribution Services Branches, as well as the Managing Director, or their designees. This committee would meet periodically to address any issue relating to the processing of wireless cable-related applications, but its primary role would be to consider written requests submitted by existing or prospective wireless cable

operators for expedited treatment of pending MDS and ITFS applications. Because of the importance of the major markets to the overall success of the wireless cable industry, WCA suggests that when the processing resources are exceeded by demand for expedited processing, the committee prioritize on the basis of market size.

Obviously, the availability of expedited processing must be limited, or else this new system will grind to a halt under a flood of requests. WCA believes that the committee should only consider requests for expedited processing where it is likely that the requesting party will rapidly commence wireless cable operations if accelerated consideration is granted. Imposing two conditions on the filing of requests for expedited consideration should assure that accelerated processing yields rapid service.

First, the wireless cable operator requesting expedited processing should be required to demonstrate to the committee that it has secured through licenses, cut-off applications that are not mutually exclusive with other timely filed applications, and/or leases, at least twelve channels (including at least four MDS channels).^{14/} Absent such a requirement, the committee is likely to be asked to

^{14/} In the *Second Report and Order* in General Docket No. 90-54, the Commission recognized that only those who have secured at least four MDS channels in a market are likely to construct a wireless cable system, and WCA agrees. *Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multichannel Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service*6 FCC Rcd 6792, 6803 (1991).

expedite the processing of applications for markets where the operator has secured too few channels to rapidly launch. In WCA's view, twelve channels, including at least four full-time MDS channels, is the minimum necessary for marketplace viability.

Second, the committee should extract a *quid pro quo* from those who would benefit from expedited processing -- a commitment to rapid construction of the proposed facilities. Those who want the Commission to hurry should be willing to do so themselves. WCA suggests that the Commission require both (1) that the equipment necessary to construct a facility authorized on an accelerated basis be ordered within fourteen days after all of the applications have been granted, and (2) that any facility authorized as a result of expedited processing be constructed within six months after all of the applications have been granted.^{15/} This should provide an adequate time to secure and install equipment. Extensions should only be granted in the most compelling of circumstances, such as the inability of manufacturers to deliver equipment that was timely ordered, or accidental damage to essential equipment.

Where wireless cable operators have been able to run the Commission's processing gauntlet, wireless cable has proven successful. Recently launched systems continue to expand at a remarkable pace. Not only are these systems

^{15/} Normally, MDS stations must be constructed within twelve months and ITFS stations must be constructed within eighteen months.

providing much needed competition to franchised cable monopolies, they are providing significant funding for local educators in the way of excess ITFS capacity lease fees, distributing educational programming more broadly than ever before possible and creating local employment opportunities. WCA believes that by adopting the “one stop shopping” proposal it advances, the Commission will accelerate wireless cable's effort to bring these same benefits to communities across America by focusing the Commission's processing power on the markets most likely to see a rapid introduction of service.

C. The Commission Should Revise Its Rules Regarding Service Of Interference Analyses On ITFS Interests To Avoid Unnecessary Delays In Processing MDS Applications.

In the *NPRM*, the Commission proposed to amend Section 21.902(i) of the Rules to eliminate provisions that unnecessarily delay the processing of MDS applications by affording ITFS entities far longer than they reasonably need to petition to deny MDS applications.^{16/} WCA fully supported that proposal -- indeed, it commented that “implementation of no single proposal in the *NPRM* will have a more immediate impact on expediting MDS application processing than this one.”^{17/} However, the *Report and Order* is silent as to the fate of the Commission's proposal.

^{16/} See *NPRM*, *supra* note 4, at ¶ 23 n.43.

^{17/} WCA Comments, *supra* note 3, at 69.

The need of MDS applicants for relief is well-established. In the initial *Report and Order* in General Docket No. 90-54, the Commission made great strides in expediting the construction of MDS facilities by eliminating rules governing the coordination of proposed facilities with ITFS interests that were, in the Commission's own words, "needlessly redundant, time-consuming and expensive."^{18/} Under the rules promulgated in the *Report and Order*, an MDS applicant was required to demonstrate non-interference to every ITFS applicant or licensee potentially affected by its proposal, and to serve each of them with an interference analysis prior to filing its MDS application. Those ITFS interests were then afforded ample time to petition to deny should they disagree with the MDS applicant's interference analysis.

In the *Reconsideration Order* in Gen. Docket No. 90-54, however, the Commission significantly altered Section 21.902 because a single group of ITFS interests complained of the burden imposed on them by having to review mutually-exclusive applications submitted under the new coordination procedures rather than just the application of a single lottery winner. Under the rules adopted in response to that complaint, an MDS applicant cannot serve its interference analyses until after the Commission gives public notice that its application is not mutually exclusive with any other application or, if it is mutually exclusive, that it has won a lottery. Then,

ITFS interests have a remarkably long 120-day period in which to petition to deny. Particularly since it often takes months for the Commission to place an application on public notice, the adverse impact of these new rules on those attempting to develop wireless cable systems is apparent.

Certainly, WCA is sympathetic to the plight of any ITFS applicant or licensee that was flooded with mutually-exclusive applications for a single license. Under the rules adopted in the *Report and Order* in this proceeding to deter speculative filings, coupled with the “first come, first served” application window system that governs the MDS, there will be virtually no mutually-exclusive MDS applications in the future.^{19/} Thus, the need for the revisions adopted in the *Reconsideration Order* in Gen. Docket No. 90-54 has evaporated. Therefore, WCA urges the Commission either to revert to the rules adopted in the *Report and Order*

^{19/} Moreover, as WCA established in its initial comments, there are less restrictive mechanisms to protect ITFS interests. For example, WCA noted that these new rules apply not only to applications for new stations, but also to applications for modification of existing facilities. Particularly given the Commission's “first come, first served” processing rules for MDS applications, it is a virtual impossibility for a modification application to be mutually exclusive with any other application. No ITFS applicant or licensee will be unduly burdened by requiring it to analyze a modification application and petition to deny under the former procedures. Therefore, WCA suggested that with respect to modification applications, the rules adopted in the *Report and Order* should continue to control; an applicant for an MDS license modification should be permitted to serve its interference studies on ITFS interests prior to filing its application and that those ITFS interests should be required to file any petitions to deny within ninety days as under the rules adopted in the *Report and Order*. Such an approach will expedite the processing of MDS modification applications by reducing the time before an application is ripe for grant, without having any adverse effect on the ITFS community. See WCA Comments, *supra* note 3, at 68-70.

in Gen. Docket. No. 90-54 or adopt the rules proposed in the *NPRM* to govern the service of interference analyses on ITFS interests and the filing of petitions to deny.

D. The Commission Should Clarify That An MDS Applicant Must Own, Have An Option To Purchase, Have A Lease Or Have An Option To Lease Its Proposed Transmission Site Prior To Making The Certification Required By Amended Section 21.15(a).

In the *Report and Order*, the Commission has elected to amend Section 21.15 of the Rules to permit MDS applicants to certify as to site availability in order to expedite application processing.^{20/} Under new Section 21.15(a)(3), “Multipoint Distribution Service applicants proposing a new station location must certify the proposed station site will be available to the applicant for timely construction of the facilities during the initial construction period.” Particularly since the Commission has announced its intent to vigorously employ all available remedies against those who make false certifications,^{21/} the Commission should take this opportunity to clarify precisely what an MDS applicant must possess in order to make the certification required by Section 21.15(a)(3).

For some time, the Commission has struggled with the debate between requiring MDS applicants merely to have “reasonable assurance” of site availability, or requiring applicants to own the site, have an option to acquire the site, have a

^{20/} See *Report and Order*, *supra* note 1, at ¶ 7.

^{21/} See *id.* at ¶ 9.

lease for the site, or have an option to lease the site. At present, the policy has been to permit applicants to demonstrate reasonable assurance of site availability with their applications, but to require a firm demonstration of site availability within ninety days of the issuance of a conditional license. This policy has substantially slowed the processing of MDS applications, for scarce staff resources are devoted to processing applications for licenses that ultimately are forfeited because the applicant cannot secure firm access to the site.

The adoption of the certification requirement could exacerbate this problem, unless the Commission makes clear that in order to make the certification required by Section 21.15(a)(3), the applicant must either own the site of the proposed station, have a legally enforceable written option to acquire that site, have a written lease for the site, or have a legally enforceable written option to lease the site. Such an approach will deter speculative applications, for it will make it very easy for the Commission to determine whether a certification was falsely given when questions arise. At the same time, no legitimate MDS applicant should have any trouble securing the necessary rights prior to filing its application.

E. The Commission Should Clarify The Rules Associated With The Installation Of Signal Booster Stations Pursuant To Section 21.913(g).

WCA applauds the Commission for easing the regulatory burden on wireless cable operators by permitting the installation of very low power signal boosters without authorization pursuant to Section 21.913(g). However, WCA

1. The first step in the process is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

2. Once the problem is identified, the next step is to define the objectives and goals of the project. This helps to clarify what needs to be achieved and provides a clear direction for the team.

3. The third step is to develop a plan or strategy to address the problem. This involves breaking down the problem into smaller, manageable tasks and determining the resources needed to complete each task.

4. The fourth step is to implement the plan. This involves putting the strategy into action and monitoring progress to ensure that the project is on track.

5. The final step is to evaluate the results of the project. This involves assessing the outcomes against the objectives and goals and identifying any areas for improvement.

located within a 1 mile (1.61 km) radius of the coordinates of the booster, or in the alternative, that a consent statement has been obtained from the affected ITFS licensee.” It is unclear, however, whether the phrase “constructed prior to May 26, 1983” relates to the ITFS station, or to the receiver. WCA believes that it should relate to the receiver in question, and urges the Commission to issue a clarification.

Third, and last, the Commission should clarify the meaning of the restriction in Section 21.913(g) that a signal booster may not “extend service beyond the boundaries of an MDS station’s protected service area.” Specifically, the Commission should make clear that this requirement is satisfied so long as the booster is located within the PSA of the station as required by Section 21.913(g)(7) and the power flux density at the edge of the MDS station’s PSA does not exceed - 75.6 dBW/m² as required by Section 21.913(g)(8), even if consumers outside the PSA can be served from the booster. Just as the Commission permits consumers outside the PSA to be served by the main transmitting facility, there is no reason for consumers that can be served by a signal booster complying with Section 21.913(g)(7) and (8) to be denied service.

III. CONCLUSION

Once again, WCA applauds the Commission for its efforts to address the havoc that has been wreaked upon the wireless cable industry by the mass filing of speculative applications and overly restrictive regulation. By adopting the

proposals WCA advances above, the Commission can further the emergence of the wireless cable industry as an effective competitor to cable.

Respectfully submitted,

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